1952

Nov. 13

Mr. Russell Brown, Director
Employment Security Division
32 South Main Street
Concord, New Hampshire

Dear Mr. Brown:

You have made inquiry regarding the date on which longevity payments would become due to Ovila A. Lemieux, Interviewer I, with your Division.

Mr. Lemieux first entered into state service March 2, 1942. On August 8, 1942 he was laid off because of a reduction in force. On December 29, 1942 he came back to work with your Division and has been continuously employed there since that time. Your inquiry pertains to whether or not this absence from state service constitutes a break in service so that for purposes of longevity pay Mr. Lemieux's longevity credit would run from December 29, 1942 rather than a period some time prior thereto.

The statutory provision pertaining to longevity pay reads as follows:

> "Any regular classified employee of the state who has completed ten years of continuous service for the state shall be paid in addition to the salary to which he is entitled by the classification plan as above revised, the sum of sixty dollars annually and an additional sixty dollars for each additional five years of continuous state service." Laws of 1947, chapter 243, section 3.

The present difficulty hinges on the interpretation of the phrase "continuous service". This phrase "continuous service", as contained in our statutory provision has at no time been construed by any court. Our only recourse, therefore, is to turn to other jurisdictions

to see if the phrase has ever been construed in any light.

In its ordinary sense the phrase denotes continuity, without break or cessation. Used in the sense of employment, the courts have tried to construe the phrase in a reasonable manner. Hence, in the case of U. S. v. Fitzpatrick, 62 Federal 2d, 562 at 564 the Court stated that the phrase "continuous employment" meant working with reasonable regularity and that work did not cease to be "continuous" because of interruptions in one's occupation due to periods of temporary illness such as are incident to people of normal health. Another court has stated that to make an act continuous its performance must be carried on without interruption, for, when its performance ceases, the act is complete and distinct and if a similar act is performed it cannot be regarded as a continuation of the former. People v. Sullivan, 9 Utah 105. The only case I have been able to find in which the fact situation is similar to that at hand is the case of Cole v. M. L. Raulings Ice Co. 120 Nebraska 439. In that case an individual was employed by the Ice Company around or about July 4 and continued in this employment until December 18 when he was discharged because of lack of work. At the time of his discharge he was advised that if at any time work picked up that he might be called back. Subsequently, on December 28 of the same year he was rehired by the Ice Company and on that day was unfortunate enough to receive fatal injuries in the course of his employment. The court held that the employment of this person could not be considered continuous employment under the terms of the Workmen's Compensation Act.

In view of the decisions and in the absence of any facts in Mr. Lenihan's case which would bring him into any accepted exception, it is my opinion that his employment has been "continuous" since December 20, 1940 and that his lay-off from August 8, 1942 to December 28, 1942 constituted a break in service, even though this lay-off was caused by a reduction in force.

Very truly yours,

Henry Doust, Jr.,
Assistant Attorney General

HD:MM